Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BENJAMIN FRANKLIN MOORE, Defendant.	No. CR97-37-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

TABLE OF CONTENTS

I. INTRODUCTION AND FACTUAL BACKGROUND

On August 7, 1997, a two-count superceding indictment was returned against defendant Moore, charging him with possessing with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and 924(e). On March 4, 1998, defendant Moore was convicted of both counts following a jury trial. He was subsequently sentenced to 200 months imprisonment. Defendant Moore appealed both his sentence and his criminal conviction. On direct appeal, Moore argued that: (1) his convictions were not supported by sufficient evidence; (2) the court erred in assessing 14 and 31.8 grams of cocaine base to him in determining his base offense level at sentencing; and (3) the court erred in assessing a two-level enhancement to his base offense level for possessing a dangerous weapon. The Eighth Circuit Court of Appeals reversed with regard to the 31.8 grams of cocaine base assessed to Moore in determining his base offense level, but affirmed in all other respects. *See United States v. Moore*, 212 F.3d 441, 443 (8th Cir. 2000). On remand, defendant Moore was sentenced to 130 months imprisonment. Defendant Moore did not appeal his amended sentence. Defendant Moore subsequently filed his current motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Moore challenges the validity of his conviction on the following grounds: 1) ineffective assistance of his counsel; 2) that evidence was introduced against him at his trial that was obtained as a result of an unconstitutional search, and 3) that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny should be applied to his motion.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United*

States, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

1. Ineffective assistance of counsel claims

Defendant Moore asserts that his counsel was ineffective in several respects. The sum and substance of these allegations is that his counsel was ineffective because he did not conduct an adequate pre-trial investigation and, as a result, did not file a motion to suppress evidence seized from Moore as a result of law enforcement's execution of a search warrant at the apartment of David Taylor.

Moore's claims of ineffective assistance presented in his § 2255 motion were not raised on direct appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first

time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687*; Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; *see Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort

> be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

Here, the court is compelled to conclude that defendant Moore has not demonstrated that he was prejudiced by his counsel's alleged errors. Both of his claims of ineffective assistance of counsel boil down to his counsel's failure to seek to suppress 3.33 grams of crack cocaine found on his person during a search by law enforcement officers that

occurred during the execution of a search warrant at the apartment of David Taylor.

Evidence at trial showed that on March 20, 1996, members of a law enforcement Special Response Team executed a search warrant in an apartment in Cedar Rapids, Iowa. Officers found Moore in the south bedroom on the second floor of the apartment, at the foot of the bed. In the room, officers also found a semiautomatic handgun and loaded magazine between the mattresses of the bed by which Moore was found. After the pistol was found, officers asked Moore about it. Moore admitted that the firearm was his. The officers then patted down Moore's person and, in Moore's pocket, officers found 3.33 grams of cocaine base. Defendant Moore asserts that the search of his person was a violation of his Fourth Amendment rights.

A pat down is unquestionably a search covered by the Fourth Amendment. As the United States Supreme Court explained in *Terry v. Ohio*, 392 U.S. 1 (1968), "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'" *Id*. at 16. Indeed, a pat down can be "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Id*. at 17. As with other searches, the constitutionality of a pat down is judged by a standard of reasonableness. *See Terry*, 392 U.S. at 19-22; *see also Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (noting that the Fourth Amendment's "; central requirement' is one of reasonableness."); *Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("[T]he Fourth Amendment bars only unreasonable searches and seizures."); *United States v. Sharpe*, 470 U.S. 675, 685 (1985) ("The Fourth Amendment is not, of course, a guarantee against all searches and seizures, but only against unreasonable searches and seizures."); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the

particular governmental invasion of a citizen's personal security.'"); *United States v. Bach*, 310 F.3d 1063, 1067 (8th Cir. 2002) ("The Fourth Amendment is governed by a 'reasonableness' standard."), *cert. denied*, 538 U.S. 993 (2003).

Relying substantially on *Ybarra v. Illinois*, 444 U.S. 85 (1979), defendant Moore avers that the officers had "no reason to believe [he] had committed, was committing, or was about to commit any offense under state or federal law." *Id.* at 91. In *Ybarra*, the Supreme Court held that although a search warrant issued upon probable cause gave police the authority to search the premises of a small public tavern and to search the bartender for narcotics, a pat-down search of a tavern patron, Ybarra, was not constitutionally permissible where there was no reasonable belief that he was involved in any criminal activity or that he was armed or dangerous. *Id.* The court concludes that the facts surrounding Moore's encounter with the officers gave rise to a reasonable belief that a pat-down search was warranted. The officers had just located a firearm in the bedroom of the house. Unlike the defendant in *Ybarra* who was a customer in a public tavern, Moore was found at a private residence. It is reasonable to infer that Moore and the other occupants of the house were connected with the distribution of the drugs. In the face of a number of individuals who were conceivably involved in illegal drug trafficking and the finding of a loaded firearm, which defendant Moore admitted was his, the officers had legitimate concerns for their personal safety. Thus, the officers could validly pat him down in order to search for additional weapons in order to ensure their safety. *See United States v. Christian*, 187 F.3d 663, 669 (D.C. Cir. 1999) (noting that "the presence of one weapon may justifiably arouse concern that there may be more in the vicinity"); *United States v. Abdul-Saboor*, 85 F.3d 664, 670 (D.C. Cir. 1996) (holding that, having already uncovered two guns "and a magazine, the arresting officers could well anticipate that other weapons were stowed throughout the apartment, perhaps even within the area in which [the

defendant] was seated"). The court concludes, under the totality of the circumstances, the officer's pat-down search of Moore did not violate the Fourth Amendment. Thus, Moore cannot establish that he was prejudiced by his attorney's failure to challenge the search of his person. Therefore, this part of defendant Moore's motion is denied.[1]

2. Applicability of the Apprendi decision

Defendant Moore also claims that his sentence was incorrect because the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is applicable to his case and therefore he is factually innocent of the drug charge for which he was convicted because the drug type and quantity are elements of a crime and must be decided by the jury. Review of this issue is precluded by the Eighth Circuit Court of Appeals's conclusion that the *Apprendi* decision presents a new rule of constitutional law that is not of "watershed" magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review. *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir.), *cert. denied*, 537 U.S. 900 (2002); *Sexton v. Kemna*, 278 F.3d 808, 814 n.5 (8th Cir. 2002), *cert. denied*, 537 U.S. 1150 (2003); *Murphy v. United States*, 268 F.3d 599, 600 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002); *Jarrett v. United States*, 266 F.3d 789, 791 (8th Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Dukes*, 255 F.3d 912. 913 (8th Cir. 8th Cir. 2001), *cert, denied*, 534 U.S. 1150 (2002); *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002). This view

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[1]Defendant Moore also asserts as an independent ground for relief that his Fourth Amendment rights were violated by the officer's search of his person and that the drugs found during that search should have been excluded from his trial. For the same reasons set forth above in the court's discussion of Moore's claim of ineffective assistance of counsel, the court concludes that, under the totality of the circumstances, the officer's pat-down search of Moore did not violate the Fourth Amendment. Therefore, this portion of Moore's motion is also denied.

of the *Apprendi* decision has also been adopted by a clear majority of the other federal courts of appeals. *See, e.g., Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir.), *cert. denied*, 537 U.S. 1096 (2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). Therefore, the court is unable to reach the merits of Moore's claim.

C. Certificate Of Appealability

Defendant Moore must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack*

v. McDaniel, 529 U.S. 473, 484 (2000)). The court determines that Moore's petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Moore's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Moore's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 28th day of September, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA